SUBMISSION OF THE LAW SOCIETY OF IRELAND
TO THE DEPARTMENT OF FINANCE IN RELATION TO THE PROPOSED FINANCIAL SERVICES (MISCELLANEOUS PROVISIONS) BILL

For further information please contact:

Sylvia McNeece
The Secretary,
Business Law Committee
Law Society of Ireland
Blackhall Place
Dublin 7

Telephone: 01 672 4802
Fax: 01 672 4803
E-Mail: s.mcneece@lawsociety.ie

PROPOSED FINANCIAL SERVICES (MISCELLANEOUS PROVISIONS) BILL

AMENDMENTS TO THE CENTRAL BANK ACTS, 1942-1998

Central Bank Act, 1971, Section 7(1) The proposed change to Section 7(1) of the Central Bank Act, 1971 seems appropriate. This Section prohibits persons from carrying on banking business (which includes the acceptance of deposits) unless they hold a banking licence and maintain a deposit in the Bank of an amount to be determined in accordance with the Act. This prohibition would encompass agents/brokers.

Central Bank Act, 1971, Section 7(4)(a) The proposed change to Section 7(4) to include the European Central Bank amongst those entitled to carry on banking business without being required to meet the Section 7(1) requirements would appear to be a suitable change, to allow for the European Central Bank's new role under the Statute for the European System of Central Banks and the Treaty of Rome.

Central Bank Act, 1971, Section 7(4)(a) The deletion of the words "or collective investment scheme in respect of the carrying on of the business of the scheme" and the insertion of "or collective investment undertakings and the entities which are employed to provide services to the collective investment undertakings of these services" may be too broad. With regard to the inclusion of entities employed to provide services, it would be preferable to specify what those services typically are - administrative, custodial, managerial etc. With regard to the insertion of "or collective investment undertakings" perhaps "in respect of the carrying on of the undertaking" should be included after it. This would prevent a situation where the main business of collective investment undertakings became the carrying out of banking business rather than the operating of funds.

Central Bank Act, 1971, Section 7(4) The inclusion of Member States under the exemptions of Section 7(4) of the 1971 Act is very broad. Is this the governments of Member States? Further definition is required. With regard to the inclusion of Member States and also Member State's Regional or Local Authorities, these categories should only be included if they are permitted to carry out banking business in their home State and if they are subject to adequate regulatory supervision. The inclusion of public international bodies is also very broad. It might be preferable to include only bodies for which the carrying on of banking business would have obvious relevance e.g. EBRD, the World Bank. Perhaps this section could be amended to allow the Minister for Finance to include other entities by way of statutory instrument.

Central Bank Act, 1971, Section 8(2)(a) The deletion of "requirements" and the insertion of "requirement" in Section 8(2)(a)(i) of the 1971 Act is necessary as this Section refers back to a single requirement in Section 8(2)(a)- that of holding a licence. "and," needs to be deleted at the end of 8(2)(a)(ii) as that is the end of the Section.

Central Bank Act, 1971, Section 8(2)(b) In relation to the proposed amendment to Section 8(2)(b) - the insertion of "person or" before "class" in the first and fifth line and "classes" after "class" in the first and fifth line - it would be preferable to insert "any person or persons, or any class or classes of persons". The inclusion of the plural of "person" is necessary, as the situation could arise where a number of entities which are different in nature, and which cannot be considered to be a class of persons, come within the scope of this Section.

Central Bank Act, 1971, 15(2) The proposed amendment to Section 15(2) - the insertion of "and Regulation 4/7 of the European Communities (Branch Disclosures) Regulations, 1993" seems appropriate.

Central Bank Act, 1971, Section 27. The amendments to Section 27 of the 1971 Act seem appropriate. Section 27 prohibits the advertising or soliciting of deposits or other repayable funds by persons other than those holding a banking licence, or those who are exempt by virtue of the 1971 Act from holding a licence. Section 8(2)(a) allows the Central Bank to exempt certain persons from the requirement to hold a licence in order to carry out banking business where the banking business they wish to carry out is limited to the issuing of securities or other obligations. The suggested amendment will enable them to carry on their business more effectively as they will now be able to advertise/solicit repayable funds.

Central Bank Act, 1971, Section 27(5) in its present form defines "solicitation" only in relation to the solicitation of deposits. The insertion of "or other repayable funds" into Section 27(5) is necessary to extend the scope of the definition.

Central Bank Act, 1989, Section 16(2)(m) The deletion of "certified persons" and its replacement with "members of that approved professional body" in Section 16(2)(m) of Central Bank Act 1989 is necessary as in its present form, Section 16(2)(m) disapplies the non-disclosure provisions contained in Section 16(1) to disclosures "made to any approved professional body in respect of certified persons". There is no requirement that those certified persons be members of the approved professional body. Also, even if Section 16(2)(m) did relate to certified persons who are members of an approved professional body, it would exclude professional bodies whose members are not "certified".

Article 12(8) of the First Banking Directive It is proposed to transpose Article 12(8) of the First Banking Directive into Irish law. There does not appear to be an Article 12(8). Article 12 only has three subsections.

Central Bank Act, 1989, Section 101(b) The proposed amendment to Section 101(1)(b) of the 1989 Act appears to be a suitable amendment.

Central Bank Act, 1989, Section 139(1) It is difficult to comment on the proposed amendment to Section 139(1) of the 1989 Act, as it is unclear in what way this Section is to be amended.

Central Bank Act, 1997, Section 74 Is it proposed to amend Section 74 by replacing "where such a person is not a credit institution" with "where such person has not previously been authorised to do so in accordance with banking law"? If this is the case, it would, for the sake of clarity, be preferable to reword the proposed amendment as follows: "where such a person is not authorised to do so in accordance with banking law, or where such a person was not so authorised at the time it was acting in contravention of the above Sections". "Has not previously been.." could exclude persons from the application of this Section where they were at one time authorised but had that authorisation revoked, and subsequently undertook activities which were in breach of Section 7 or Section 27.

Central Bank Act, 1997, Section 70(c) In relation to Section 70(c), "(2)" should be removed, and this subsection should be appended on to the definition of "banking business".

Central Bank Act, 1998, Section 6(4) The proposal to insert "subject to the requirements of the Central Bank Acts, 1942 to 1997, and any other enactment" at the beginning of Section 6(4), of the Central Bank Act, 1942 as amended by Section 5, of the 1998 Act would seem appropriate (subject to changing 1997 to 1998), as it will limit the Minister's ability to consult with the Governor or the Board on matters relating to the execution and performance by the Bank of any function and duty imposed on it, to the confines of the Central Bank Acts.

Central Bank Act, 1998, Section 5 It is also intended to clarify Section 6(5) of the 1942 Act, as amended by Section 5 of the 1998 Act, to specify that the Board of Central Bank shall have no role regarding ESCB tasks. Section 6(5) allows the Minister to request the Governor on behalf of the Board or the Board to inform him regarding the pursuit of the primary objective imposed on the Bank by 6(1) of this Section, and the Board shall comply with every such request. Reference to the Board should be removed. It has already been specified in Section 5A (2) that the Governor has the sole authority and responsibility for the performance of any function or duty or the exercise of any power conferred or imposed by the Treaty or the Statute for the European System of Central Banks. Although under Section 5A (3) the Governor shall keep the Board informed of the discharge of those functions/duties etc.

Central Bank Act, 1998, Section 5 It is further intended to clarify that the primary objective, as specified in Section 6(1) of the 1942 Act, amended by the 1998 Act, does not cover all ESCB tasks. This should already be clear from the use of the phrase "primary objective".

Central Bank Act, 1998, Section 8 The proposed amendment to Section 8 seems fine. It sets out the legislative basis on which the Central Bank or the European Central Bank may require that a reporting agent be provided with information under Section 18(1)(i) and (ii) by the entities listed in Section 18(1). The definition of the Treaty and Statute will need to be inserted into the 1971 Act to clarify the proposed amendment to Section 18(1)(i) and (ii) which makes references to the Treaty and Statute on the European System of Central Banks.

Central Bank Act, 1998, Section 10 The proposed amendment to Section 10 of the 1998 Act seems fine. Perhaps it might be preferable to say "that is required for the purpose of his functions under Section 11 of the Central Bank Act 1998".

Central Bank Act, 1998, Section 18 The proposed amendment to Section 18 is required as otherwise this Section could be interpreted as only preventing the Governor from being the director of a credit institution which only has one director, rather than preventing him from being one of the directors of a credit institution which has several directors.

SI 395 OF 1992

The proposed change to Reg. 14(13)(a) is fine.

SI 168 OF 1995

The proposed amendment to Reg. 5(2) to exclude "debt securities" from the deposit base as well as "certificates of deposit" seems fine.

SI 294 OF 1992

While we would not foresee any problem with the proposed amendment, as it concerns accounting practices, we would not be in a position to provide a more detailed opinion.

FURTHER CHANGES TO THE CENTRAL BANK ACTS

It is intended to bring the powers of authorised officers under banking supervision legislation into line with those given to authorised officers under the Investment Intermediaries Act, 1995 and the Stock Exchange Act, 1995. The principle behind the creation of authorised officers is the same in the Central Bank Act, 1989 as it is in the IIA and the Stock Exchange Act - the creation of officers who have the power to enter the premises of the institution to obtain information. However, the powers in the IIA and the Stock Exchange Act are more extensive. Such an amendment will bring the provisions in the 1989 Act up-to-date.

It is proposed that the powers given to the Bank under the IIA and the Stock Exchange Act to apply to the Courts to issue disqualification directions should be extended to apply to all entities regulated by the Bank (e.g. licensed banks). These powers allow a supervisory authority, where it is concerned that an officer or employee of an investment business firm is incompetent or liable to render himself unsuitable to act as an officer or employee of an investment business firm, to apply to the High Court to issue a direction to direct the authorised investment business firm concerned to have the officer removed or the employee dismissed. The incorporation of similar provisions into the Central Bank legislation would be appropriate and useful.

INVESTMENT INTERMEDIARIES ACT, 1995

It is intended to delete all references to the Minister for Enterprise, Trade and Employment from the Investment Intermediaries Act, 1995. This amendment is fine.

Section 3 The proposed amendment to Section 3 concerns the insertion of a provision for the serving of notices on investment business firms, stock exchanges and member firms by fax or by e-mail. Such an amendment should be permissible. Section 9 of the Electronic Commerce Act, 2000 states that "Information (including information incorporated by reference) shall not be denied legal effect, validity or enforceability solely on the grounds that it is wholly or partly in electronic form, whether as an electronic communication or otherwise." We would suggest that a notice is a form of information.

Section 19 The proposed amendment to Section 19 seems fine. This will prevent investment business firms from moving their books and records without informing the relevant supervisory authority beforehand, and perhaps delaying before informing the supervisory authority.

Section 21(2) The proposed amendment to Section 21(2) seems fine. As with similar powers granted to the supervisory authority under this Act, in order to adhere to the principles of natural justice, before such directions are issued, notice should be given to the relevant entities (the investment business firms etc.) that such directions will be issued unless the directors etc. of the entity co-operate with Central Bank's investigation, and the directors etc. must be allowed an opportunity to respond to any allegations of refusal to co-operate set out in the notice.

Section 31(6) The proposed amendment to Section 31(6) seems appropriate.

Section 33(3) The proposed amendment to Section 33(3) seems appropriate.

Section 36 The proposed amendment to Section 36 seems appropriate.

Section 52(6) We would suggest that it would be more effective to amend Section 52(6) with "account with a credit/financial institution" in place of an "account" rather than to amend it with "bank account". "Account with a credit/financial institution" is broader and will incorporate a wider variety of accounts e.g. accounts with building societies etc.

Section 72/73 It is proposed that either Section 72 or 73 be amended to provide that, in the event of a firm having no assets, neither the Bank nor the Exchequer will be made liable for the liquidators fees. It would be more appropriate to make this amendment to Section 72 which relates more to winding up and bankruptcy.

Section 74(1) The proposed broadening of Section 74(1) so that a determination can be made other than on the basis of a report from an unauthorised officer seems fine, particularly as the investment business firm or professional body will have the opportunity to challenge such information before the High Court.

Section 74(1) The other proposed amendment to Section 74(1) - the substitution of "has been a breach" with "may have been a breach" seems fine. It may not make very much difference, as neither requires the demonstration that an actual breach has taken place ("has been a breach" is preceded by "it appears ... that"). The evidential requirement in relation to "it appears...that there has been a breach" may be easier to meet.

Section 74(8) It is proposed that Section 74(8) be amended to give the High Court the power to "confirm" as well as "vary, or annul" a determination of the Committee. This amendment is necessary, as otherwise, on the appeal of a determination, the Court is obliged either to alter or to annul the determination of the Committee and may not leave it stand.

Section 74(8) It is further suggested that Section 74(8) be amended by the addition of "and the Court may make any order that it sees fit". This addition is necessary, as the power to confirm, vary or annul the determination just relates to the actual declaration that there has been a breach of condition or requirement. It does not give the High Court the power to make an order in respect of the determination, or to amend any order that has been made by the Committee. This is clear from Section 74(7) which gives the Committee two distinct powers (1) to make a determination that there has been a breach of a condition or requirement and (2) that it "may do all or any of the following ...". At present, the High Court can only deal with (1).

Section 74(8) The proposed amendment to Section 74(8) giving the Central Bank a right of appeal to the High Court is appropriate.

It is further proposed to amend the Act by including an obligation on product producers giving written appointments in the State to take reasonable measures to ensure that those intermediaries to whom they are giving written appointments are of good character and are sufficiently competent to provide the investment business service, and that the product producer should also be obliged to monitor the investment product intermediary to whom a written appointment has been given on an ongoing basis to ensure that the agent is acting in a bona-fide manner. The product producer may be obliged to produce evidence to the Central Bank that it is adhering to the above requirements. This amendment seems fine. Perhaps further definition of reasonable measures should be included.

STOCK EXCHANGE ACT, 1995

Section 5 In relation to the proposed amendment to Section 5, see comments on the proposed amendment to Section 3 of the Investment Intermediaries Act.

Section 29(2) In relation to the proposed amendments to Section 29(2), see comments in relation to Section 21(2) of the Investment Intermediaries Act.

The other proposed amendments seem fine.

INVESTOR COMPENSATION ACT, 1998

Section 2 The amendment to the definition of administrator in Section 2 to enable an administrator to be appointed to an investment business firm by the Central Bank in a situation where a liquidator is already in place seems appropriate. The role of the administrator is to deliver to the Investment Compensation Company or to the compensation scheme of which the investment firm is or was a member, and to the supervisory authority, the names of eligible investors and a statement of the net loss of each investor and a statement of the compensatable loss of each investor. It is thus necessary that, even though a liquidator may already be in place, an administrator should be appointed to look after the interests of the investors.

Section 32 The proposed amendment to Section 32 also seems appropriate, as it is desirable to discourage investors from seeking compensation for losses in the event of an appointment of a provisional liquidator or an examiner, as such would hinder attempts to keep the investment business firm operating as a going concern.

Section 33 The proposed amendment to allow compensation to be paid on foot of qualified statements of net loss and compensatable loss of investors issued by administrators would seem to be appropriate. Such an amendment would greatly increase the significance of the qualified statements. Should such statements not be subject to approval, for example by the supervisory authority, and perhaps open to challenge as well?